

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

SCHANN V ELLIOTT

Claimant

APPEAL NO: 13O-UI-14140-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR STORES OF IOWA INC

Employer

OC: 09/15/13

Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer’s Account

STATEMENT OF THE CASE:

Family Dollar Stores of Iowa, Inc. (employer) appealed a representative’s October 9, 2013 decision (reference 01) that concluded Schann V. Elliott (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on January 16, 2014. The claimant participated in the hearing. A review of the Appeals Section’s conference call system indicates that the employer’s representative received the hearing notice and responded by calling the Appeals Section on January 13, 2014 and indicated that Frank Sposeto would be available to participate on behalf of the employer at the 11:30 a.m. scheduled time for the hearing at a specified telephone number. However, even though a member of the Appeals Section support staff had called the number for Mr. Sposeto at 11:30 a.m. to advise him that the administrative law judge would be calling shortly, that support staff was only able to leave a voice mail message for Mr. Sposeto, and when the administrative law judge called that number for the hearing at about 11:45 a.m., Mr. Sposeto was still not available; therefore, the employer did not participate in the hearing. Despite the fact that the administrative law judge also left a message for Mr. Sposeto, he did not call back to the Appeals Section either on January 13 nor by the date this decision was issued. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the employer’s account subject to charge?

OUTCOME:

Affirmed. Benefits allowed. Employer’s account not subject to charge in current benefit year.

FINDINGS OF FACT:

The claimant started working for the employer on May 27, 2013. He worked full time as a store manager at one of the employer's Des Moines, Iowa stores. His last day of work was September 13, 2013. The employer discharged him on that date. The reason asserted for the discharge was an "inability to keep a team together."

The claimant had been having a number of job performance issues. The claimant had acknowledged that he did not have sufficient training to adequately serve as a store manager, and on or about September 1 he had agreed to step down into an assistant manager position so that he could gain more training in that position. The employer had been agreeable to the claimant remaining employed as an assistant manager, and the change was to occur on or about September 20. The claimant was unaware of any incident or reason that would have changed the employer's decision to keep the claimant in his employment.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is in essence his unsatisfactory job performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. There is no evidence the claimant intentionally worked below the best of his abilities. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began April 1, 2012 and ended March 31, 2013. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's October 9, 2013 decision (reference 01) is affirmed as originally issued. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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